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IN THE

Supreme Court of the United States

October Term, 1971

No. ..... 71 - 428

JOHN BACALL, JOHN BACALL IMPORTS, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners in Pro Per.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, John Bacall and John Bacall Imports, Ltd., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 11, 1971.

Opinion Below.

The opinion of the Court of Appeals is reported in 443 F.2d 1050 (1971) and is reproduced in the Appendix to this petition. There was no opinion rendered by the District Court for the Central District of California.

The opinion of the Court of Appeals in the companion civil case is reported in 412 F.2d 586 (1969) and is also reproduced in the Appendix to this petition.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 11, 1971. A timely petition for rehearing was denied on July 28, 1971. The time for filing a petition for writ of certiorari in this cause was extended to and including September 24, 1971 by an Order dated August 14, 1971. This Court's juisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 22(2).

Questions Presented.

1. Whether, in the face of a proper motion to suppress and consistent with *Wong Sun v. United States,* 371 U.S. 371, 487-488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1962) and *Alderman v. United States,* 394 U.S. 179, 183, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), evidence that is admittedly the result of an illegal search and seizure, can nonetheless be deemed properly admitted against a defendant when the trier of fact has implicitly found, upon abundant evidence, that the government has failed to carry its burden of showing that the evidence had an origin independent of the illegal search and seizure.

2. Whether, if as the result of a foreign investigation of an importer's business activities, which investigation would not have been undertaken but for the knowledge gained from an illegal search and seizure at that importer's business premises, and which investigation utilizes such knowledge, the government discovers evidence of the very type it was seeking against the importer (*i.e.,* of a customs violation), which evidence would not otherwise have discovered, such evidence is nonetheless admissible over a proper motion to suppress because the government did not know of nor

seek those specific items of evidence at the time of commencing its foreign investigation, but sought only, in a more general way, whatever evidence of suspected customs violations might be found by further investigation of the importer's activities.

Statute Involved.

This case involves the Fourth Amendment to the United States Constitution which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case.

Petitioners John Bacall and John Bacall Imports, Ltd., were indicted and tried below on a seven-count indictment charging violation of 18 U.S.C. § 542 by falsely understating on Customs invoices the cost of certain fabrics allegedly imported from France. Each petitioner was convicted upon four counts (Counts I to IV) and appealed to the Court of Appeals for the Ninth Circuit which affirmed the convictions on Counts I, III and IV and reversed as to Count II.[1]

In the proceedings below, defendants gave timely notice of a motion to suppress the use in evidence of all goods, records and other property seized by customs

[1]The Record on appeal herein consists of three volumes, of which Volume I contains the "Pleadings" and is referred to herein by the abbreviation "R"; and of which the other two volumes are the "Reporter's Transcript" and which are referred to herein by the abbreviation "Rep. Tr.".

officers on November 4 through 12, 1966, and all the fruits and knowledge gained as a result of that seizure. [R. 37.] The hearing on the motion was, by stipulation, consolidated with the government's presentation of its substantive case, on the condition that if the government's case survived a motion for judgment of acquittal, the issues raised by the motion to suppress would then be heard and determined. [Rep. Tr. p. 63, line 5, to p. 65, line 3.] At the conclusion of the government's substantive case, the motion for judgment of acquittal was granted as to Counts V, VI and VII, but denied as to Counts I, II, III and IV. [Rep. Tr. p. 142, lines 2-6; Rep. Tr. p. 155, lines 8-11.] As to the remaining Counts, the issue raised by the motion to suppress—referred to throughout the trial as "the taint issue" [see, *e.g.*, Rep. Tr. p. 155, lines 13-14]—was then taken up with the introduction of evidence first by the government, which voluntarily assumed the burden of proof on the issue [Rep. Tr. p. 155, lines 19-25], and then by the defense.

The "taint" or "poison fruit" issue arose out of the admittedly illegal search and seizure made by U.S. Customs agents at defendants' business premises during the period from November 4 through 10, 1966.[2] (See, *United States v. Bacall*, 443 F.2d 1050, 1053 (9th Cir. 1971) [Appendix page 3]; *John Bacall Imports, Ltd. v. United States*, 287 F.Supp. 916, 918-

[2]As a result of the seizure the government brought a civil action to forfeit the seized merchandise; Imports countered with an action to compel return of the seized property. The two actions were consolidated and determined by one judgment. In the instant cause the trial court took judicial notice of the judgment and opinion in that consolidated case. [Rep. Tr. p. 282, line 11, to p. 283, line 2.] The opinion, which constituted the trial court's findings and included the judgment, is reported in *John Bacall Imports, Ltd. v. United States*, C. D. Cal., 287 F. Supp. 916.

919 (C.D. Cal. 1968); *John Bacall Imports, Ltd. v. United States,* 412 F.2d 586, 588 (9th Cir. 1969.) A foreign investigation of petitioners' activities, which, as implicitly, if not expressly, found by the trial court,[3] but for the knowledge gained from the illegal search and seizure, would not have been undertaken,[4] and in the pursuance of which knowledge and leads obtained from the illegal search and seizure were plainly utilized,[5] turned up letters from the files of the French supplier Blech Freres and checks which constituted the convicting evidence herein. (Opinion Below, 443 F.2d at 1054, Appendix pages 4-5.)

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[3]The District Judge stated, *inter alia,* "I am finding that there is taint but I am precluded by the Ninth Circuit. . . . [referring to the supposed effect of the companion civil case (Appendix II)] [Rep. Tr. pp. 286-289]; Opinion Below, 443 F.2d at 1055, Appendix pages 6-7.

[4]See, *e.g.,* Opinion Below, 443 F.2d at 1056, 1057, 1061, Appendix pages 7, 9, 16 ("We assume *arguendo* that the French investigation would not have been undertaken but for the illegal search and seizure).

[5]See, *e.g.,* Exhibit 7. The French agent who made the foreign investigation had no information save that given to him in the request from U.S. Customs [Ex. 7] which was "made . . . to the French customs authorities . . ." by the U.S. Customs Attaché [Rep. Tr. p. 250, line 12, to p. 251, line 3]—and which the French agent studied carefully. Knowledge gained and suspicions raised from the analysis of the seized goods were used in the preparation of Exhibit 7. [Rep. Tr. p. 166, lines 9-11; p. 187, line 6, to p. 204, line 7.] [Ex. 7, pp. 3-4, 6] The request sought to channel the course and goal of the investigation to be made, by itemizing a long list of "information from the foreign shippers or sellers" to be obtained. [Ex. 7, pp. 4-5.] So, too, and obviously for the orientation and guidance of the French investigator, it gave a substantial amount of information, most of which was derived from the illegal seizure.

The course thus channeled by the seizure information led the French investigator to the desired goal—the government's "ability to sustain a criminal case" [Ex. 7, p. 4]—for it led to the checks and letters that became the convicting evidence. [*E.g.,* Rep. Tr. p. 183, line 7, to p. 187, line 5; Exs. 11, 13, 14, 15; Rep. Tr. pp. 14-17.]

The District Judge below, on the evidence presented in connection with the motion to suppress, expressly and unequivocally concluded that the convicting evidence, including the letters and checks, was tainted by the illegal search and seizure. However, he deemed himself powerless to grant the motion because of an erroneous conclusion, as petitioners have argued and as the Court below assumed *arguendo* was so [Opinion Below, 443 F.2d at 1055, Appendix page 7], that he was precluded from doing so by virtue of the doctrine of collateral estoppel and the decision of the Ninth Circuit in the companion civil case, *John Bacall Imports, Ltd. v. United States,* 412 F.2d 586 (9th Cir. 1969) (Appendix II) — stating, *inter alia,* "I am finding that there is taint but I am precluded by the Ninth Circuit. . . ." [Rep. Tr. pp. 286-289.][6] But for this misconception, it is clear that the District Judge would have granted the motion and entered a judgment of acquittal.

The trier of fact's conclusion that the evidence was tainted—that the evidence was the product of the illegal search and seizure—was abundantly supported by the evidence presented. The Court below, without giving due regard to the finding of the trier of fact, and focusing primarily on the fact that in pursuing the foreign investigation the government did not have in mind the specific discovery of these specific items of evidence (the letters and checks) [Opinion Below, 443 F.2d at 1057, 1061, Appendix pages 9, 16] held the evidence was not tainted and was properly admitted.

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[6]The Court of Appeals sets forth most of the District Judge's remarks in its opinion at p. 1055 (Appendix pages 6-7) but omits the just quoted statement.

REASONS FOR GRANTING THE WRIT.

As related in the Statement of the Case, but for an erroneous application of the doctrine of collateral estoppel, which error the Opinion Below considered unnecessary to confront (443 F.2d at 1055; Appendix page 7), the motion to suppress would have been granted and the convicting evidence would have been properly excluded. The posture of the case on an appeal, if any were taken, would have been a review of whether the District Court's granting of the motion to suppress was proper—with all intendments in favor of the trial court's action. The factual inquiry would have been whether the findings were supported—as they were abundantly. (See, *United States v. Page,* 302 F.2d 81, 85 (9th Cir. 1962); *cf. Campbell v. United States,* 373 U.S. 487, 493, 83 S.Ct. 1356, 1360, 10 L.Ed.2d 501, 507 (1963).) The fact that the District Court erroneously applied the doctrine of collateral estoppel, and so denied the motion, should not, and we submit, does not, change this.

The Court of Appeals, however, addressing itself directly to the taint question, ignores the implicit finding of the trier of fact that in connection with the motion to suppress the government had failed to carry its burden of proving that the subject evidence was of sufficiently independent origin as to remove the taint. This was the government's burden under the established principle enunciated in *Alderman v. United States,* 394 U.S. 165, 183, 22 L.Ed.2d 176, 192, 89 S.Ct. 961 (1969). The opinion of the Court of Appeals, while paying lip service to *Alderman* (at page 1056, Appendix page 8) ignores this principle and is in conflict with it.

In addition, the Court of Appeals purports to say that even though the subject evidence admittedly would not have been uncovered but for the illegal search and seizure, because the foreign investigation which unearthed it would not otherwise have been undertaken [443 F.2d at 1056, 1057, 1061; Appendix pages 7, 9, 16] and that even though the government has not carried its burden to show that the evidence had a sufficiently independent origin so as to be purged of the taint, the evidence was still properly admitted. Such a holding is, however, we submit, a misapplication and misinterpretation of *Wong Sun v. United States,* 371 U.S. 471, 487-488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1962) and, as noted, contrary to *Alderman.*

In *Wong Sun,* this Court stated in pertinent part:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'."

In the instant case, the checks and letters in question were "come at" directly by the exploitation of the illegally seized goods, and from the information gleaned from them. They would not have been come at otherwise.

This is not a case of serendipity as was involved in, for example, *United States v. Williams,* 436 F.2d 1166 (9th Cir. 1970) upon which the Court below so heavily relies. In that case, serendipity was clearly involved. The officers were not looking for evidence of criminality when they happened to speak to Mrs. Lopez about possible lodging for Williams' dog and cat. Nothing that was illegally seized and evaluated led them to go to Mrs. Lopez—and they were not conducting an investigation when they went to her. In contrast, here the government, on the basis of what was learned as a result of the illegal seizure, determined to conduct the foreign investigation that would not have otherwise been conducted, to seek out the very sort of evidence which it found, and in pursuing that investigation was led directly to the evidence in question. That was not serendipity; it was precisely what the government was after. Furthermore, in that investigation, leads gained from the illegal seizure were plainly used. (See footnote 5, *supra.*) This, we submit, was the precise exploitation of the illegality referred to in *Wong Sun.*

The test applied by the Court below, rather than conforming to the standard set forth in *Wong Sun,* was, essentially this:

> "The question to be answered is not whether the Blech letters and checks would have been discovered in the absence of the seizure. It is, rather, whether anything seized or any leads gained from the seizure tended significantly to direct the foreign investigation toward those *specific letters and checks*—whether the Customs officers had

> after seizure [sic] a substantially greater reason to seek *those* specific items than they had before the seizure." (443 F. 2d at 1057) (Appendix page 9). (Emphasis added).

This test, applied by the Court below, is, we submit, not the *Wong Sun* test; in fact that Court's opinion is in conflict with, and contrary to, *Wong Sun*.

Moreover, not only is the decision in conflict with *Wong Sun* and *Alderman*, and not only does the Court of Appeals' error deprive the instant petitioners of the benefits of their rights under the Fourth Amendment, but the misconstruction of *Wong Sun* in the Opinion Below, along with the fact that the Court ignores the trial court's obvious conclusion that the government had failed to carry its burden, if left standing, could lead to great uncertainty in the future, and if followed, to reversible error in countless Fourth Amendment search and seizure cases in both the state and federal courts. Since such "taint" or "poison fruit" questions are so common and recurring, it is, in our view, important that this Court address itself to the issues involved and to the possible misconceptions raised by the Opinion Below so that these questions may be settled more clearly for purposes of the efficient administration of the judicial system—for the guidance of both state and federal courts in dealing with these recurring questions.

Conclusion.

For the reasons set forth, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

JOHN BACALL,
JOHN BACALL IMPORTS, LTD.,
Petitioners in Pro Per.

Of Counsel:
DONALD S. GREENBERG,
(Application for Admission to Supreme Court Bar in Process).

1ST item for Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN BACALL, *Defendant-Appellant.*	No. 25,428
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN BACALL IMPORTS, LTD., *Defendant-Appellant.*	No. 25,429

[May 11, 1971]

Appeal from the United States District Court
for the Central District of California

Before: BARNES, DUNIWAY and TRASK,
Circuit Judges

DUNIWAY, Circuit Judge:

Having waived jury trial and special findings of fact, Rule 23(a), (c), F.R.Crim.P., codefendants Bacall and John Bacall Imports, Ltd. were each convicted on four counts charging violation of 18 U.S.C. § 542 by falsely stating on Customs invoices the cost of fabrics purchased from the French supplier Blech Freres (Blech). Bacall was sentenced to serve two years imprisonment on each count, to run consecutively, and to pay a fine of $5,000.00 on each count, making a total term of 8 years imprisonment and a total fine of $20,000.00. John Bacall Imports, Ltd. was sentenced to pay a fine of $5,000.00 on each count, making a total fine of $20,000.00.

We affirm the convictions on Counts I, III, and IV, and reverse the convictions on Count II.

A. *The facts.*

John Bacall Imports, Ltd., is a one-man corporation, consisting of its owner John Bacall. Bacall is in the business of importing fabrics from France and Italy.[1] His practice has been to travel to those countries, visiting various textile manufacturers and merchants and placing his orders with them. Bacall would engage a French (or Italian) agent to book space on a vessel leaving from a French (or Italian) port for Los Angeles; thus all the fabrics ordered during any given trip from the various French (or Italian) suppliers would arrive at Los Angeles at one time. Once the shipments were through Customs, Bacall would bring the fabrics to his warehouse, where he would break the shipments down and send the fabrics to his customers throughout the United States. Bacall generally paid his European suppliers by sending them cashier's checks drawn on various banks in or near Los Angeles. This cycle of European travel to place orders, shipment to Los Angeles, and payment by check recurred each year. In question here are shipments from France that arrived in Los Angeles in the months of June in the years 1963, 1964, 1965, and 1966.

All the fabrics consigned to Bacall aboard a given vessel arriving in Los Angeles would be documented in one Customs Entry; thus there was one Customs Entry for each of the French shipments here in question. Included in each Customs Entry were Special Customs Invoices (Customs form 5515), one corresponding to the fabrics purchased from each French supplier. Each invoice required Bacall to provide a full description of the fabrics from that supplier and to state the total cost of those fabrics.

In April, 1966 and July, 1966 two other shipments of fabrics consigned to Bacall arrived in Los Angeles. The fabrics were placed in a Customs warehouse, where Customs agents examined them and took samples to determine their composition. The fabrics were then released to Bacall, who transferred them to his warehouse and commingled them with other imported textiles on which the duties had previously been paid. The Customs agents ran laboratory

[1] When we say "Bacall" we refer to both appellants, unless a contrary intention is expressed.

analyses on the samples; the results of the analyses showed that many of the fabrics had been misdescribed in the invoices, always in such a way as to lower the duty to be paid. On November 4 and 10, 1966, Customs agents, acting without a warrant, went to Bacall's warehouse, seized all the fabrics there and transported them to a Customs warehouse in a moving van. They proceeded to make an exhaustive inventory of the fabrics, classifying them according to actual composition, declared composition, and supplier. The results of the inventory were collated and summarized by Agent Meglen, who oversaw the seizure and inventory.

On the basis of the inventory findings and with the approval of his supervisor, Agent Meglen set in motion a foreign investigation. On January 9, 1967, he wrote a lengthy letter, Exhibit 7, referring the Bacall case to the United States Customs representative in Paris, one Jacques Changeux, asking Changeux to refer the case to the French Customs Service (under the terms of a French-American agreement) and to request that French customs investigate Bacall's dealings with the French suppliers. Meglen's referral letter first reviewed generally the case existing against Bacall at that time. The case then consisted entirely of evidence, obtained before and during the seizure and inventory, showing that Bacall had knowingly misdescribed on Customs invoices both the composition (wool, silk, etc.) and the classification (embroidery, woven, knit, etc.) of the imported fabrics. Doubt also existed as to whether the shipments were actually "job lots" or "close-outs" as invoiced, but there was then no evidence that they were not.

Meglen's referral letter then set out general instructions for the conduct of the French investigation. The instructions included the following [Exhibit 7, page 4]:

> "It is requested that you obtain the following information from the foreign shippers or sellers. . . .
>
> Was the merchandise in fact, 'job lot'? . . . . Similar fraudulent invoicing can be substantiated on importations dating back to 1964. . ., and similar shipments have been received yearly by John Bacall Imports, Ltd., dating back to 1962.
>
> . . . .
>
> Do these invoices presented for Customs Entry reflect the true purchase price?
>
> . . . .?"

Meglen's referral letter then set out in considerable detail the evidence showing that Bacall had misdescribed the imported fabrics; most of the evidence had been obtained through the seizure and inventory. The evidence was organized to correspond to Bacall's various French suppliers. the *entire* entry under the Blech heading is as follows [Exhibit 7, page 9]:

> "There does not appear to be any false invoicing with respect to composition for the fabrics from this seller. The fact that most of the fabric is invoiced in a manner which results in its classification at a high rate of duty would seem to preclude the possibility that it is other than as invoiced. The value of the fabric is, however, open to question."

Changeux duly referred the case to the French Customs Service. He wrote a second, much briefer, referral letter in French [defendant's Exhibit G], and attached to it Meglen's referral letter. Changeux's letter again summarized the case against Bacall, focussing again on misdescription of the fabrics. The letter made no mention of specific instances of possible understatement of costs, though it did refer to general suspicions concerning stated prices, arising from the "job lot" and "close-out" characterizations. Changeux's letter also stated that (translated from the French):

> "We would be very grateful if you would undertake an investigation with the suppliers and the broker in question . . . to determine the composition and the real value of the exported merchandise, and if you would furnish us with all the documents relating to these exportations that you are able to obtain."

The case was assigned to Raymond Lalisse of the French Customs Service. Lalisse received the letters from Changeux and Agent Meglen sometime in January, 1967; he began the investigation into Bacall's French dealings on March 20, 1967, and had his first interview with persons at Blech on June 12, 1967. Lalisse obtained from the Blech files several letters showing what Bacall had paid Blech for fabrics purchased in the years 1963, 1964, 1965, and 1966. Using the information obtained from the Blech files, customs agents in this country examined Bacall's banking transactions and obtained cashier's checks used by him to pay Blech. The payments included special finishing and processing charges above and beyond the cost of the unfinished goods. The purchase prices stated on the Bacall Customs invoices for the Blech fabrics for each of these years

reflected only the cost of the unfinished goods. Thus, using the letters obtained by Lalisse from the Blech files, and in this country on the basis of those files, the government was able to show that Bacall had knowingly understated the purchase price of the Blech importations for each of the shipments in question.

In addition to producing proof of Bacall's knowing understatement of the Blech prices, the French investigation yielded evidence that Bacall had requested from other foreign suppliers, and had submitted to Customs, false invoices, and that these false invoices invariably misdescribed the accompanying fabrics in such a way as to materially reduce the apparent duty owed. Armed with this evidence, the government sought an order of forfeiture under 19 U.S.C. § 1592 of the two shipments that had arrived in Los Angeles in April and July 1966 and that had been among the commingled materials seized without warrant from Bacall's warehouse. Bacall in turn brought a replevin action for the return of the seized goods, claiming that they had been unlawfully seized. The two actions were consolidated for trial in the district court. The court found the seizure to have violated Bacall's rights under the Fourth Amendment, denied the government's request for forfeiture, and ordered all the seized material returned to Bacall. *John Bacall Imports, Ltd. v. United States*, C.D.Cal., 1968, 287 F.Supp. 916.

The government appealed. We affirmed that part of the district court's judgment holding the seizure unlawful, but reversed that part of the judgment requiring the return of *all* the seized material. *John Bacall Imports, Ltd. v. United States*, 9 Cir., 1969, 412 F.2d 586. We found that

> "[p]rior to trial, the government developed other evidence having no connection with, or relation to, the search and seizure. It showed generally that in many cases John Bacall instructed his foreign suppliers to furnish separate invoices covering different costs in the processing of the raw materials. Bacall submitted only one of the invoices to Customs, thus understating the cost of the merchandise. In other words, the description in the invoice was incorrect and Bacall knew it to be so.
>
> There was also proof developed that Bacall paid substantially more for the merchandise than was reflected on the submitted invoices. His income tax return for the year involving [the importations of April and July 1966] showed his cost for the

merchandise to be $230,000 whereas the amount declared to Customs was only $50,000.

None of this evidence recited generally above was in any way the fruit of the search and seizure. Moreover this evidence was in no way connected with or related to such search and seizure.

. . . .

. . . The two cases are remanded to the district court for further proceedings in the light of this opinion. The district court will determine on evidence, independent of and not connected with the search and seizure, what merchandise should be forfeited pursuant to 19 U.S.C. § 1592." 412 F.2d at 588-89.

On July 31, 1968, the Grand Jury indicted Bacall on seven counts of violating 18 U.S.C. § 542, entry of goods by means of false statements. Ultimately Bacall was convicted on Counts I-IV, a motion of acquittal being granted as to Counts V-VII for insufficient evidence. The charges proved at trial, and the only charges at issue here, were that, on each of four occasions, Bacall had submitted Special Customs Invoices that "falsely stated the cost of the fabric purchased from the foreign seller Blech" and that Bacall "then and there well knew" that to be so. The government expressly waived prosecution on all charges concerning Bacall's alleged misdescription of the composition and classification of the imported materials. The government's proof of each of the four charges consisted of comparing the cost stated for the Blech shipment as shown on the invoices in the respective Customs Entries with the payment made by Bacall to Blech, as shown by the letters and checks obtained during and as a result of the French investigation.

By far the most significant issue raised at trial, and the major issue raised on appeal, is the question whether the papers taken from the Blech files and the cashier's checks were tainted by the unlawful seizure of the materials in Bacall's warehouse. The trial judge addressed himself to this issue, at the conclusion of the trial, as follows:

"It is implicit in that finding [in the forfeiture trial, 287 F.Supp. 916] that the search tainted or the seizure tainted the entire investigation made afterwards, but the circuit in its own independent investigation of the facts on appeal found that I

was wrong. . . . I can't understand why that . . . finding of fact was made, because every reasonable man who investigated the evidence would have to agree that it was tainted.

But for the finding of the court of appeals in the civil cases [412 F.2d 586], I would have to find that the search was tainted, but I have to obey the law and I have to obey the mandate of the circuit even though I may disagree with it, and because of that mandate and because of that finding set forth in the Ninth Circuit's opinion, I must find on that basis only that I am mandated to find that the investigations in France . . . [were] not tainted by the search.

To me, [Defendant's] Exhibits A, B and F without any equivocation demonstrate the taint, but all of that was brought out at the civil trial, . . . and if the circuit held I was wrong I have to admit that I was wrong.

Therefore, your motions [to suppress the letters and checks] are denied. . . ."

B. The letters and checks were not tainted by the seizure.

Bacall contends that the trial judge erred in believing himself "mandated" by our decision in the forfeiture case, 412 F.2d 586. We have considerable doubt whether the decision in the forfeiture cases is *res judicata* or creates an estoppel by judgment in this case. However, we need not decide that question. We are convinced that, on the merits, and without regard to the possible effect of that decision, the evidence on which the convictions in this case rest was not fatally tainted by the seizure.

The trial judge admitted that evidence. If he was correct in doing so, the judgment should stand, whether or not the reason given by him was correct. See *Smith v. United States,* 9 Cir., 1949, 173 F.2d 181, 185; *Wagner v. United States,* 9 Cir., 1933, 67 F.2d 656, 57; *cf. Wilson v. United States,* 9 Cir., 1958, 250 F.2 312, 324.

Bacall argues that Agent Meglen would not have requested the French investigation but for the information obtained through the seizure and the subsequent inventory. And of course the French investigation would not have been undertaken but for Meglen's request.

We assume *arguendo* that the French investigation would not have been undertaken but for the illegal search and seizure. How-

ever, as the Supreme Court said in *Wong Sun v. United States*, 1962, 371 U.S. 471, 488-89,

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'."

Accord, *Alderman v. United States*, 1969, 394 U.S. 165, 180-81; *United States v. Williams*, 9 Cir., 1970, F.2d , (No. 25,395, Dec. 29, 1970, slip opinion at 6). Put somewhat differently, what kind of *direction* and *impetus* did the illegal seizure give to the Blech investigation? This question is often a difficult one. See generally, Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif. L. Rev. 579 (1968); Comment, *Fruit of the Poisonous Tree—a Plea for Relevant Criteria*, 115 U.Pa.L.Rev. 1136 (1967). It is so in this case. We start, therefore, by reviewing the criteria that courts have applied in implementing the rule of *Wong Sun*.

Such criteria abound. Even if the controverted evidence could have been traced directly or indirectly from the leads turned up by the illegal search, the evidence will nevertheless be admissible if in fact "the Government learned of [it] 'from an independent source'." *Wong Sun v. United States, supra*, 371 U.S. at 487, quoting *Silverthorne Lumber Co. v. United States*, 1920, 251 U.S. 385, 392; *United States v. Scharf*, 9 Cir., 1970, 421 F.2d 1239; *Durham v. United States*, 9 Cir., 1968, 403 F.2d 190, 196. Alternatively, it may be crucial to a determination of taint that, at the time of their initial illegal action, the officers had no reason to suspect the defendant of any crime other than that in connection with which the action was undertaken, and that they had no reason to believe that the action would turn up specific evidence of any other crime. See *United States v. Diaz*, 1 Cir., 1970, 427 F.2d 636, 637. Put more bluntly, it may be crucial "that an object of the illegal conduct was the securing of the evidence sought to be suppressed." *Allen v. Cupp*, 9 Cir., 1970, 426 F.2d 756, 759.

If the controverted evidence is obtained by information available to the officers "without resort to any clue or knowledge gained from the items unlawfully seized," a strong case exists for the absence of a taint. *Standard Oil Co. v. State of Iowa*, 8 Cir., 1969, 408 F.2d 1171, 1177. Where the evidence sought to be suppressed was discovered through utilization of some legally obtained leads as well as some illegally obtained leads, the substantiality of the legally obtained leads may influence the determination whether the evidence ought to be suppressed. See *James v. United States*, D.C. Cir., 1969, 418 F.2d 1150, 1152; *contra, United States v. Schipani*, 2 Cir., 1969, 414 F.2d 1262, 1266. And if the illegally obtained leads were so insubstantial that their role in the discovery of the evidence sought to be suppressed "must be considered *de minimis*," then suppression is inappropriate. *Durham v. United States, supra*, 403 F.2d at 196. See *McGarry v. United States*, 1 Cir., 1967, 388 F.2d 862, 871. Where the investigation that led to the controverted evidence "was not intensified by reason of any tainted information," the case for suppression is again weaker. *United States v. Schipani, supra*, 414 F.2d at 1266.

Finally, an operative though often unarticulated factor in the determination whether to suppress evidence discovered in part through prior unlawful action is the offensiveness of that action; "where that conduct is particularly offensive the deterrence ought to be greater and, therefore, the scope of exclusion broader." Comment, *supra*, 115 U.Pa.L.Rev. at 1151; see also *id.* at 1151-53.

In applying these criteria to the case before us, we reiterate our assumption that illegal seizue *was* a "but for" cause of the foreign investigation. The question to be answered is not whether the Blech letters and checks would have been discovered in the absence of the seizure. It is, rather, whether anything seized or any leads gained from the seizure tended significantly to direct the foreign investigation toward those specific letters and checks—whether the Customs officers had after seizure a substantially greater reason to seek those specific items than they had had before the seizure. We conclude that they did not and that the letters and checks were not tainted and were properly admitted into evidence.

First: We cannot say that the discovery of the letters and checks had a source wholly "independent" of the unlawful seizure; it resulted from the foreign investigation the major purpose of which

was to follow up other, concededly tainted, leads obtained from their seizure. But the source of the discovery is not conclusive on the issue of taint. Even when illegally seized evidence is a "but for" source of the subsequent discovery of additional evidence, whether that additional evidence was come at by an "exploitation" of the illegal seizure will depend upon the precise role the illegal seizure *in fact* played in the subsequent discovery. *Cf. Harrison v. United States*, 1968, 392 U.S. 219, 224. For example, when officers through serendipity discover evidence concerning a suspect whom they are unlawfully investigating in connection with another, different crime, the new evidence is not tainted where the officers discovered it only because their unlawful investigation fortuitously put them in a position to do so and where their unlawful investigative intent did not extend to the additional evidence. *United States v. Williams, supra,* slip opinion at 61; *cf. Agius v. United States*, 5 Cir., 1969, 413 F.2d 915, 919-20.

Second: Like the discovery in *Williams*, the eventual discovery of the letters and checks evidencing Bacall's understatement of the Blech Freres purchase prices was basically an example of investigatory serendipity. In seizing the fabrics and undertaking the subsequent inventory, the Customs agents were concerned with discovering additional misdescriptions of the composition and classification of the fabrics, rather than with uncovering evidence that Bacall had understated the purchase price. Indeed, Agent Meglen testified that, during the inventory, he did not even check the Blech fabric to determine what its value might be. Thus it was not the case "that an object of the illegal [seizure] was the securing of the evidence sought to be suppressed." Although as a result of his previous examination of the Customs Entries (which were, of course, in the possession of the government all along) Agent Meglen felt that the stated Blech purchase prices did not "seem reasonable," nothing in the record suggests that, at the time of the seizure, Agent Meglen suspected Bacall of willfully understating those prices or that he had any reason to believe that the seizure and inventory would yield evidence supporting any such suspicion.

Third: The Blech letters and checks were obtained "without resort to any clue or knowledge gained from the items unlawfully seized." Agent Meglen's referral letter summarized what was known about Bacall's dealings with *all* his suppliers, not just those transac-

tions that contained evidence of illegality. Blech was included in the letter despite the absence of any evidence that Blech fabrics had been misdescribed by Bacall, simply because Bacall was known to have dealt with Blech over a period of years. The mere presence of the Blech entry in Meglen's referral letter does not in itself suggest that the seizure and inventory uncovered any evidence of illegality in the Blech transactions.

Moreover, nothing in the record suggests that the seizure and the inventory uncovered any such evidence. Agent Meglen himself testified to that effect:

> "Q. As specifically regards the French seller Blech Freres, did you obtain any information in the seizure or from the merchandise itself that helped you in making your recommendations as far as a foreign investigation of Blech Freres was concerned?
>
> A. No, I didn't."

At the conclusion of the inventory the Customs officers had no more reason to suspect that Bacall had understated the Blech prices than they had at the time of the seizure. True, Agent Meglen did testify that in his referral letter he concentrated "on the possibility of undervaluation" of the Blech fabric because the results of the inventory showed that no Blech fabrics had been misdescribed.[2] But eliminating one suspicion (misdescription) is not to be equated with uncovering affirmative evidence supporting another (understatement of price), even though the former may in theory aid an investigation by establishing that one less lead need be followed. No evidence of understatement of the Blech prices was even adumbrated as a result of the inventory. Although Agent Meglen's re-

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[2]Meglen's testimony was as follows:

"Q. Did you examine the Blech Freres fabric before you wrote the [referral] letter?

A. I would say that I looked at the Blech Freres fabric.

Q. And did you check it to see anything about the value?

A. No, no.

Q. You had no interest in doing that?

A. All I did was inventory the fabric. My initial interest was only—since the fabric had been invoiced as wool, I felt there was no likelihood of false description since [wool] received a high rate of duty, so I concentrated instead in my report on the possibility of undervaluation because of the low value shown for wool fabric."

ferral letter stated that the "value of the [Blech] fabric is . . . open to question," the opening was no larger after than before the seizure.

Nor does it even appear that Agent Meglen had, after the seizure and the inventory, any reason to believe that the contemplated foreign investigation would turn up specific evidence that Bacall had understated the prices of the Blech shipments. Bacall argues to the contrary, pointing to the Blech entry in Meglen's referral letter, which states that "The value of the fabric, however, is open to question." Bacall asks us to read that entry in light of one of Meglen's general instructions to the foreign investigator: "Do these invoices presented for Customs entry reflect the true purchase price?" Bacall's argument is, apparently, that this general and broad instruction was given direction and focus by Meglen's statement that the Blech prices were "open to question." We think just the opposite: that the highly tentative statement concerning Blech dissipated the significance of the already unspecific instruction so far as Blech was concerned. And Lalisse's testimony supports our conclusion. Lalisse testified that he read the entire referral letter, including the general instruction concerning the invoiced purchase prices. He nonetheless concluded that Meglen's brief reference to the Blech prices being "open to question" was "not enough for me to think that you attach much importance to it."[3]

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[3]The relevant excerpt of Lalisse's testimony is as follows:

"Q. Had your [*sic*] originally planned to see Blech Freres?

A. [Lalisse]. No. To tell you the truth, I went to see Blech Freres. I take [*sic*] the opportunity of another trip to the east of France to make the verification.

Q. In other words, you were going somewhere else and you decided to stop off and see Blech Freres?

A. That's right.

Q. Why did you originally not decide to go see anybody at Blech Freres?

A. Just because before I started this investigation I read carefully the report being forwarded—being attached to the request of the U.S. Customs attache in Paris, and I marked the suppliers which I thought were the most important to be seen first.

Q. And you didn't think Blech Freres was most important to be seen?

A. No.

Q. Why?

A. Because—you see, when I read that sentence: 'But the value of the fabric is, however, open to question,' this was not enough for me to think that you attach much importance to it."

Fourth: The aspect of the investigation dealing with Bacall's frequent descriptions of imported fabrics as "job lots" or "close-outs" did not taint the discovery of the letters and the checks. It is true that the Customs officers had some doubts about the accuracy of many of these descriptions, and Agent Meglen did request, in his general instructions, that the foreign investigation look into this question. Both Meglen's letter and the testimony of former Customs Agent Cummings show, however, that these doubts had already existed well prior to the illegal seizure, and nothing in the testimony or exhibits suggests that any discoveries made in the course of the seizure or the inventory increased those doubts. In any case, the Blech letters and checks had no tendency by themselves to show that Bacall had falsely described the Blech fabrics as "job lots" or "close-outs." The source of Bacall's understatement of the prices was his omission of finishing costs and special charges that should have been added to the prices of the unfinished goods; simple payment records, such as the letters and checks, suffice to prove such understatement, but they do not suffice to show deliberate mislabelling as "job lots" or "close-outs."

Fifth: Even if we tread on thin ice in asserting that no leads concerning the Blech understatement resulted from the seizure and that the seizure in no way directed additional suspicion toward the Blech transactions, we think that any such leads as may have been obtained were *de minimis.* Discovery of the letters and the checks was a consequence primarily of the fact that the foreign investigation was undertaken at all, not of the fact that it was undertaken only after the seizure. Even the request of Changeux, that French Customs agents determine the real value of the exported merchandise and obtain available relevant documents, had no evident genesis in the specific information acquired as a product of the seizure. Moreover, to the extent that Changeux's request goes beyond any of Agent Meglen's general instructions, the request is not traceable to the seizure, and the results of the French investigation are not tainted by it. Particularly in light of Lalisse's attitude toward the investigation of the Blech transactions, see note 3 *supra,* any taint that may exist is *de minimis.*

Sixth: The Blech inquiry was not "intensified by reason of any tainted information." Nothing in the record suggests that Blech was investigated more intensively than it would have been had the

foreign investigation preceded the seizure; indeed, an argument might be made to the contrary, for the customs agents concentrated on Bacall's misdescription of the goods, and after the seizure they might have thought they already had most of the evidence they needed. Certainly the timing of the foreign investigation is attributable to the seizure. To say, however, that the investigation occurred when it did is to say only that the seizure was a "but for" cause of the Blech investigation, not that it intensified it.

Seventh: Without possessing a search warrant or even facts sufficient to constitute probable cause, the Customs agents "removed a warehouse door, stripped [Bacall's] warehouse, left it in shambles and conducted a knowingly unlawful search for business records." *John Bacall Imports, Ltd., v. United States,* C.D. Cal., 1968, 287 F.Supp. 916, 920. Such action is by no means inoffensive. Compare *See v. City of Seattle,* 1967, 387 U.S. 541, 543. It is, however, much less offensive than the action taken in *Henderson v. United States,* 9 Cir., 1967, 390 F.2d 805, which Bacall urges us to follow. That case involved a strip search, including an attempted vaginal search, of a woman crossing the border from Mexico into the United States. In *Henderson* the first search may have been little more than a "but for" cause of the second. Nevertheless, the second search was suppressed because any search of the body, and especially a strip search, is offensive in the extreme. Even a frisk for weapons has been called "a severe, though brief, intrusion upon cherished personal security, and . . . surely an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio,* 1968, 392 U.S. 1, 25. The search in *Henderson* was much more so.

By comparison, the illegal seizure from Bacall's warehouse involved a significantly less offensive intrusion. Had Bacall's home been searched, the indignity suffered would not have been as great as that in *Henderson.* The indignity suffered in an unlawful search of a warehouse is still smaller. *Cf. See v. Seattle, supra,* 387 U.S. at 545-46. The lesser degree of offensiveness permits a less extensive scope to be given to the taint resulting from the illegal seizure, thus accommodating to a degree two antithetical objectives, deterring illegal seizures and obtaining evidence of crimes.

A less extensive taint does not mean that unlawful seizures such as this one are to go undeterred. We agree with the trial judge that, had Bacall been prosecuted for falsely stating the composition

of the fabrics, "[t]here would be no way in the world that [the government] could remove the taint of the illegal search." We think that threat constitutes adequate deterrence. As we said in *Durham v. United States, supra,* 403 F.2d at 195,

> "The price is too high and the advantage too uncertain to make it reasonable to suppose that law enforcement officers will be encouraged to indulge in unlawful searches, knowing that what they find will be suppressed, in the hope of obtaining admissible evidence as remote and fortuitously acquired as this."

Accord, *Allen v. Cupp,* 9 Cir., 1970, 426 F.2d 756, 759; *Collins v. Beto,* 5 Cir., 1965, 348 F.2d 823, 827 & n 8; *cf. Pitler, supra,* 56 Calif. L. Rev. at 586-87; Comment, *supra,* 115 U. Pa. L. Rev. at 1148. And for a factual situation in some respects very close to the one in this case, see *Parts Manufacturing Corp. v. Lynch,* 2 Cir., 1942, 129 F.2d 841.

Eighth: The trial judge was of the opinion that "[Defendant's] Exhibits A, B and F without any equivocation demonstrate" that the letters and checks obtained from the Blech files were tainted by the illegal seizure and the subsequent inventory. We think not. Exhibit A was a set of rough notes made by Agent Meglen; the notes comprise a chronology of Agent Meglen's activities concerning the Bacall investigation beginning with October 28, 1966 (and perhaps earlier) and extending to November 29, 1966. Thus the notes cover the period during which the seizure occurred. Exhibit B was a rough draft of a letter concerning the Bacall investigation composed by Agent Meglen and originally intended to be sent to the Director of the Office of Investigations of the Bureau of Customs in Washington, D.C.; a final draft was never sent. The letter contains a detailed explanation of many of the events leading up to the seizure. Neither Exhibit A nor Exhibit B suggests that, before the illegal seizure, Agent Meglen or any other Customs officer had any intention of undertaking a foreign investigation. Exhibit F is a letter from Drexel Watson, a Customs agent in Los Angeles, to the District Director of Customs in Los Angeles; the letter had been approved by Oscar Polcuch, Customs Agent in Charge in Los Angeles. The letter recounts the seizure and the evidence that Bacall had misdescribed fabric composition and classification on the invoices; it goes on to say.

"Since it appears unlikely that Bacall will provide this office with any incriminating evidence in the nature of correspondence, records or admissions, we therefore have requested the Regional Customs Representative, Rome, Italy, and the Senior Customs Representative, Paris, France, to contact the manufacturers and shippers in their respective areas and obtain from these people all available records pertaining to Bacall's importations."

Bacall claims that these exhibits demonstrate that, until the seized materials had been inventoried, no consideration had been given to a foreign investigation and that the foreign investigation was undertaken solely as a follow-up to and as a result of the illegal seizure. The trial judge appeared to accept the argument. All the argument proves, however, is that the foreign investigation would not have been undertaken but for the seizure, and we have already assumed that to be the case. Exhibits A, B, and F have no tendency to prove that the discovery of the letters and checks were "come at by exploitation" of the seizure, which is the controlling issue.

The letters and checks obtained from the Blech files were not tainted by the illegal seizure and were admissible into evidence to prove that Bacall had willfully understated the purchase prices.

C. *Introduction into evidence of Excerpts from the Bacall Deposition was not reversible error.*

On August 24, 1967, the government took a deposition from John Bacall during the consolidated civil cases involving John Bacall Imports, Ltd. Government counsel read excerpts from that deposition into the record in this case, over the objection of counsel for Bacall.[4]

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[4]Those excerpts are, in their entirety:

"Q. And you are associated with the plaintiff in this action which is John Bacall Imports, Ltd.?

A. Yes, sir.

Q. And what is the nature of your association?

A. I am the president of the company."

* * * *

"Q. Since 1960, have you individually or as John Bacall Imports, Ltd., imported fabrics?

A. Yes. John Bacall Imports, Ltd. only.

Q. And how many occasions has John Bacall Imports, Ltd. imported fabrics since 1960?

Bacall contends that because the deposition was taken by the government in connection with the replevin action instituted by John Bacall Imports, Ltd., to recover the seized goods, his compliance in giving the requested deposition was necessary to vindicate his Fourth Amendment rights, and that, therefore, to use the deposition in a subsequent criminal trial is to force him to choose between asserting his rights under the Fourth Amendment in the forfeiture case and asserting his right not to testify in this case. In support of his argument, Bacall relies primarily on *Simmons v. United States*, 1968, 390 U.S. 377, 389-94. In *Simmons* the Supreme Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394.

We need not decide whether the rule of *Simmons*, which involved a motion to suppress evidence seized in connection with a criminal case, applies equally to a suppression motion made in a criminal case where the evidence sought to be suppressed was taken in connection with a prior civil case. Assuming the *Simmons* rule to apply, we find that admitting the deposition excerpts was

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A. My recollection, sir, was once every year."

* * * *

"Q. Would the names of the sellers of these fabrics appear on the Customs entry documents which you prepared and submitted?

A. Always. Customs has all the documents to my knowledge."

* * * *

"Q. Would you pay him before you got the merchandise, or afterwards?

A. It varies, sir. My recollection is that it was done—I mean, that it was never paid before they presented an invoice. You know, they had to present an invoice and this invoice was presented about the time when the merchandise arrived to America, to Los Angeles."

* * * *

"Q. Do you have any memory or knowledge of whether or not you made a second trip to Europe in the summer of 1966?

A. Not as I can remember."

* * * *

"Q. Now, after you sold merchandise here in this country, who actually prepared the merchandise to be shipped from your warehouse to your shipper?

A. I did. That is the reason I got a nervous breakdown."

harmless beyond a reasonable doubt. *Chapman v. California*, 1967, 386 U.S. 18, 24.

It appears from the record that the government introduced these excerpts only for the limited purpose of showing that "John Bacall personally is responsible for the acts of John Bacall Imports, Ltd.," and that the trial judge was aware of this limitation. Bacall also recognizes this limitation but argues that the deposition supplied "substantial, if not, indeed, the only, evidence connecting [John Bacall] Imports with the offense charged." We think, however, that there was in the record ample evidence to show beyond a reasonable doubt that the business of Bacall personally and the business of John Bacall Imports, Ltd., were indistinguishable. The letters to Blech had "John Bacall Imports, Ltd." letterheads and were signed by John Bacall personally. Some checks were remitted to Blech by John Bacall personally, and others by John Bacall Imports, Ltd. One check was made to the order of John Bacall Imports, Ltd., and was endorsed over to Blech by both John Bacall Imports, Ltd. and John Bacall personally. The Special Customs Invoices generally named as the importer John Bacall Imports, Ltd., but at least four invoices named "M. John Bacall." Finally, the Customs Entries show that H. H. Elder & Co., a customs brokerage firm, acted as attorney-in-fact for John Bacall Imports, Ltd. in all the importations. However, George De La Sierra, the president of H. H. Elder & Co., testified as follows concerning the nature of his business dealings with Bacall:

> ". . . *Mr. Bacall* would bring shipments in through [*sic*] once a year approximately. I first became acquainted with him about 1955 or thereabouts, and we assisted *him* in our business as a customs broker in bringing in shipments through the U.S. Customs." (Emphasis added.)
>
> • • • •
>
> "Q. And it is your testimony that in all of these seven instances, the invoices were furnished to you *by Mr. Bacall*?
> 3. Yes, that's right." (Emphasis added.)
>
> • • • •
>
> "Q. Sir, what was your business relationship to Mr. Bacall?
> A. I have been engaged *by Mr. Bacall* to represent *him* as *his* customs broker." (Emphasis added.)

We think that the evidence described above was easily sufficient

to permit a finding that the business of John Bacall and the business of John Bacall Imports, Ltd. were one and the same. Bacall introduced no evidence to the contrary. Under these circumstances, admission into evidence of the excerpts from Bacall's deposition, if it was error, was harmless beyond a reasonable doubt.

D. *Introduction of secondary evidence of the contents of an income tax return was not reversible error.*

Bacall claims that the trial judge erred in permitting Agent Meglen to testify concerning the amount shown for purchases on the income tax return of John Bacall Imports, Ltd. for the fiscal year ending in 1967. If there was error, it was not prejudicial. On cross-examination Agent Meglen testified that the figures in several returns were not broken down to indicate which individual purchases cost how much. Thus, introduction of the returns did not further the government's case; it may have tended to show that sometime during the years in question Bacall had overstated his prices on some Customs invoices, but it did not tend to show that he did it on the Blech invoices.

E. *There is insufficient evidence to sustain a Conviction on Count II.*

A careful examination of the records and exhibits in this case reveals that there was adduced at trial *no* evidence showing what cost figure was used on the June 1964 Blech invoice. The figure of 28,141 Francs, used by the government, appears in government counsel's opening argument to the judge, which is not evidence. In a subsequent argument on a motion for acquittal, government counsel again adverted to a figure of about 28,000 Francs for the 1964 importation; this, too, is not evidence. During the latter argument, government counsel appeared to believe that the figure came from Government's Exhibit 17. It did not, for Exhibit 17 is a Customs Entry for an importation from Italy, not from France. According to Count II of the indictment, the 1964 Blech invoice should appear in Customs Entry No. 64-271772, but that Entry was never introduced into evidence (or even marked for identification) in this trial, nor is any testimonial evidence of its contents to be found in the transcript. Accordingly, the government has failed to show what figure Bacall stated on the invoice for the purchase price of the Blech fabrics imported on June 23, 1964, and has therefore failed to prove that he understated the price.

Bacall did not assign this failure of proof as error at the trial. Nor did he argue the failure of proof as grounds for reversal of Count II on appeal, although he did advert to it in the Statement of Facts in his opening brief. This court is reluctant to consider objections raised for the first time on appeal. *Ignacio v. People of the Territory of Guam,* 9 Cir., 1969, 413 F.2d 513, 517 and cases cited; *Marshall v. United States,* 9 Cir., 1969, 409 F.2d 925, 927. We are considerably more reluctant to notice on our own motion, errors not raised below when the parties have not even urged us to do so. Nonetheless, we are empowered to notice, in our discretion, "[p]lain errors or defects affecting substantial rights" which were brought neither to our attention nor to the attention of the trial court. Rule 52(b), F.R.Crim.P.; *Gilbert v. United States,* 9 Cir., 1962, 307 F.2d 322, 325. We may do so when confronted with "unusual circumstances involving seriously prejudicial deficiencies in the trial process," *Reisman v. United States,* 9 Cir., 1969, 409 F.2d 789, 791, or when "it appears to be necessary in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." *Davis v. United States,* 9 Cir., 1970, 425 F.2d 673, 674.

Bacall's conviction on Count II satisfies these criteria. There is no evidence in the record that Bacall ever did the act for which his conviction lies. To convict him nonetheless would certainly involve a "seriously prejudicial deficienc[y] in the trial process" and a clear "miscarriage of justice," and would cast great doubt on "the integrity and reputation of the judicial process." The failure to introduce into evidence Customs Entry No. 64-271772 may have been a momentary lapse on the part of government counsel, but it represents too crucial a flaw in the criminal process to permit the convictions to stand.

The convictions of each appellant on Count II of the indictment are reversed. In all other respects, the judgments are affirmed.

ARCATA GRAPHICS, SAN FRANCISCO 5-14-71—360

412 F 2d 384

2nd
Item for
Appendix

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN BACALL IMPORTS, LTD., *Appellee,* vs. UNITED STATES OF AMERICA, *Appellant.*	No. 23,037
UNITED STATES OF AMERICA, *Appellant,* vs. 42 WOODEN SHIPPING BOXES OF TEXTILE FABRICS, etc., *Appellee.*	No. 23,038

[June 20, 1969]

Appeal from the United States District Court
Central District of California

Before: BARNES and CARTER, Circuit Judges, and KILKENNY,* District Judge.

JAMES M. CARTER, Circuit Judge:

Two actions were begun in the district court; No. 23,037 by John Bacall Imports, Ltd. (hereafter Bacall Ltd.), the owner of certain merchandise, to obtain its return following a custom seizure and No. 22,038 by the United States to forfeit, pursuant to 19 USC § 1592, the merchandise which had been seized. The actions were consolidated for trial and a joint judgment entered; in No. 23,037 declaring the merchandise to have been illegally seized and order-

*Hon. John F. Kilkenny, United States District Judge, District of Oregon, sitting by designation.

ing it returned to the owner; and in No. 23,038 declaring the merchandise to have been illegally seized and denying relief to the United States by way of forfeiture. This consolidated appeal followed.

We decide two questions:

(1) Was there an illegal search and seizure by Customs agents?

(2) If the search and seizure was illegal, should the merchandise have immunity from forfeiture if the Government can otherwise prove, absent the use of any evidence obtained through such search and seizure, that the merchandise was subject to forefeiture under 19 USC § 1592?

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Following an investigation and the sampling of certain boxes of fabrics, part of Entries No. 66 and 67, and prior to the release of the merchandise from Customs, agents on November 4, 1966, went to the Bacali Ltd. warehouse and posted stickers on certain of the material therein that "United States Custom seals must not be removed, compartment or package opened, or goods removed except in the presence of a United States Customs Officer . . ."

The Customs agents had previously been advised by John Bacall, the one man owner of Bacall Ltd., that he had no inventory except that which came in under Entries No. 66 and 67. At the warehouse, Bacall's girl friend, the only person present, told them that not all the fabrics belonged to Bacall. They were unable to identify the fabrics from Entries No. 66 and 67 because of the large quantity of the materials. Accordingly the agents wrote on legal sized papers the following:

"Notice

All merchandise consigned to John Bacall Imports, Ltd. is under seizure by the U.S. Customs. This merchandise must not be removed or tampered with."

It subsequently developed that the warehouse also contained imports from Entries No. 63, 64 and 65 which imports were not in question in this proceeding.

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On November 10, 1966, Customs agents, without a search warrant, returned, found the warehouse locked, broke in and carried away all the fabrics in the warehouse.

Subsequently No. 22,037 and the forfeiture proceeding, No. 22,038, were instigated and the warrant for arrest of the merchandise was issued and delivered to the U.S. Marshal. He served the warrant on Customs. The merchandise was at the time of trial, and is now, in the constructive possession of the U.S. Marshal.

We affirm that part of the judgment in Nos. 23,037 and 23,038 as to the illegality of the search and seizure on the basis of the events of November 10, 1966. We express no opinion as to whether Customs agents may make a valid seizure by the posting of notice as shown by their actions on November 4, 1966.

In No. 23,037 we reverse, for the reason shown below, that part of the judgment requiring a return of all the merchandise to Bacall Ltd.

We come now to No. 23,038. The Government prior to the seizure had evidence available for use under 19 USC § 1592. Samples had been taken and tested from various of the boxes of fabrics. Prior to trial, the government developed other evidence having no connection with, or relation to, the search and seizure. It was developed by both a domestic and foreign investigation. It showed generally that in many cases John Bacall instructed his foreign suppliers to furnish separate invoices covering different costs in the processing of the raw materials. Bacall submitted only one of the invoices to Customs, thus understating the cost of the merchandise. In other cases, the description in the invoice was incorrect and Bacall knew it to be so.

There was also proof developed that Bacall paid substantially more for the merchandise than was reflected on the submitted invoices. His income tax return for the year involving Entries No. 66 and 67 showed his cost for the merchandise to be $230,000 whereas the amount declared to Customs was only $50,000.

None of this evidence recited generally above was in any way the fruit of the search and seizure. Moreover this evidence was in no way connected with or related to such search and seizure.

Bacall Ltd. contends that *none* of the merchandise seized is subject to forfeiture by the United States because of the illegal search and seizure. This contention would immunize from forfeiture because of an illegal search and seizure, goods illegally imported into the United States, even though the government had proof independ-

ent of the search and seizure, supporting the forfeiture. This is not the law.

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) followed *Boyd v. United States,* 116 U.S. 616 (1886) which held that evidence *obtained* in violation of the Fourth Amendment might not be relied upon to support a forfeiture. *One 1958 Plymouth,* supra, then held that the rule was applicable to the states. The case had nothing to do with evidence unconnected with the alleged search and seizure. *Berkowitz v. United States,* 340 F.2d 168 (1 Cir. 1965) is not contrary.

The mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture. *Dodge v. United States,* 272 U.S. 530 (1926); *United States v. One Ford Coupe Automobile,* 272 U.S. 321 (1926). Nor is the validity of these cases destroyed by *One 1958 Plymouth,* supra. In that case in Note 7 (380 U.S. at 700), the Court in referring to the same cases said, "The question involved in both of these cases was not the introduction of evidence seized in violation of the Constitution . . ."

Accordingly in No. 23,038 that portion of the judgment holding the search and seizure illegal is affirmed. That portion of the judgment denying the complaint of the United States for forfeiture of the goods is reversed. The two cases are remanded to the district court for further proceedings in the light of this opinion. The district court will determine on evidence, independent of and not connected with the search and seizure, what merchandise should be forfeited pursuant to 19 USC § 1592.

There has been a co-mingling of the goods from Entries No. 66 and 67,, with other goods from prior entries not contested herein. This problem we leave to the district court, together with consideration of 19 USC § 1615, dealing with the burden of proof.

Affirmed in part; Reversed in part; Remanded with instructions.

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